

# Denver Law Review

---

Volume 66  
Issue 4 *Tenth Circuit Surveys*

Article 18

---

February 2021

## Contracts

Denver University Law Review

Follow this and additional works at: <https://digitalcommons.du.edu/dlr>

---

### Recommended Citation

Denver University Law Review, Contracts, 66 Denv. U. L. Rev. 703 (1989).

This Article is brought to you for free and open access by the Denver Law Review at Digital Commons @ DU. It has been accepted for inclusion in Denver Law Review by an authorized editor of Digital Commons @ DU. For more information, please contact [jennifer.cox@du.edu](mailto:jennifer.cox@du.edu), [dig-commons@du.edu](mailto:dig-commons@du.edu).

## CONTRACTS

*Missouri Pacific Railroad v. Kansas Gas and Electric Co.*, 862 F.2d 796

Petitioner entered an agreement with respondent railroad to maintain in return for rail services safe working conditions on petitioner's property for the benefit of respondent's employees. The agreement stated petitioner would indemnify respondent for losses resulting from its obligation under the Federal Employers' Liability Act (FELA) to pay claims on its employee's injuries sustained from petitioner's failure to maintain a safe work environment. Petitioner permitted a dangerous obstruction to be placed on the railroad tracks on petitioner's property and one of respondent's trains derailed. While re-railing the train, one of respondent's employees was injured. Respondent negotiated with its employee to settle the injury claim. Petitioner, however, refused to either negotiate or settle the claim. Respondent settled the claim and filed suit for indemnity. The district court, on summary judgment, found (1) that petitioner caused employee's injury by permitting the obstruction that caused the derailment; (2) that respondent's settlement was reasonable; and (3) that respondent was entitled to ten percent prejudgment interest as well as reasonable attorney's fees. Petitioner appealed, asserting that issues of fact existed, precluding summary judgment.

The Tenth Circuit affirmed, finding the presence of causation between petitioner's permittance of the obstruction and the employee's injuries, since the language of the parties' contract based liability for indemnity on any injury merely "arising out of or connected with" the failure to keep the track clear of obstructions. Second, the court held respondent's settlement reasonable, as a matter of law, since any decision to settle based on potential liability is valid and the district court can rule summarily that the settlement amount is reasonable where petitioner fails to establish an issue of fact on the amount of damages. Third, prejudgment interest was properly awarded, since interest is recoverable on liquidated claims. Claims are liquidated when both the amount due and the date on which it is due are fixed and certain. Finally, attorney's fees were properly awarded, since the language in the parties' contract specifically contemplated liability for them.

*Nunn v. Chemical Waste Management, Inc.*, 856 F.2d 1464

Both plaintiffs and defendants appeal the district court's findings in a breach of contract suit involving the sale of an industrial waste disposal company. Affirmed in part, reversed in part, and remanded.

The Tenth Circuit upheld the district court's finding that the plaintiffs breached warranties contained in the sales agreement which transferred the stock of National Industrial Environmental Services, Inc., to Chemical Waste Management. The district court correctly found the

sales agreement to be ambiguous, and its construction of the agreement's warranty provision in light of this finding of ambiguity was upheld using a clearly erroneous standard of review.

Part of the district court's damage award was intended to compensate Chemical Waste Management for its lost profits due to the defendants breach of warranty. The Tenth Circuit overturned this portion of the award, noting that National Industrial Environmental Services (NIES) was the party that lost profits, not Chemical Waste Management. Since NIES was not named in the defendant's counterclaim, no lost profit damages could be awarded — despite the fact NIES was a wholly owned subsidiary of Chemical Waste Management.

The court of appeals also determined that despite the state law remedies available to both parties, the case necessitated remand to better determine the liability of both parties under the terms of the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9601 et. seq.

*Hess Oil Virgin Islands Corp. v. UOP, Inc.*, 861 F.2d 1197

Plaintiff appeals from the damages award and denial of attorney's fees, and defendant appeals the finding of liability.

HOVIC and UOP entered into several contracts related to the development of a distillate desulphurizer (DD4). The Engineering Agreement obligated UOP to furnish engineering specifications which HOVIC was required to follow, and contained a limitation on UOP's potential liability. This action was brought by HOVIC as subrogees to recover damages for an oil refinery fire. HOVIC asserted three theories of recovery: breach of contract, breach of warranty, and negligence. After the damages trial, the jury found UOP 70% negligent, and HOVIC 30% negligent. This court rejected UOP's argument that HOVIC's negligence claims were negated by the contract and stated that a party may be liable in tort for breaching an independent duty, even where the relationship creating such a duty originates in the parties' contract. HOVIC argued that the trial court erred by reducing the total damages recovered by HOVIC by its percentage of negligence, and then applying the amount of credit for its settlements with other parties. The Tenth Circuit agreed with HOVIC and remanded so that the credit be first subtracted from the total award prior to the plaintiff's percentage of negligence.

*Crawford v. 733 San Mateo Co.*, 854 F.2d 1220

Appellant Gattas appeals the district court's finding that she is jointly and severally liable on a promissory note that was executed in conjunction with a loan agreement between one of the plaintiffs, Ticketmaster Corp., and the defendant partnership, of which her husband is a member. Affirmed.

The court of appeals held that despite the facts the original promis-

sory note was: (1) lost by plaintiff Crawford; and (2) modified without Appellant's approval, New Mexico law would allow Crawford to enforce the note since he proved its existence and terms with clear, cogent, and convincing evidence.

*Jenkins v. Prudential-Bache Securities, Inc.*, 847 F.2d 631

Plaintiff appeals from a district court order affirming an arbitration decision of the New York Stock Exchange, Inc. The Arbitration panel found for defendant and plaintiffs allege error in the review of the arbitration award. The role of the courts in reviewing arbitral awards is limited to the determination of whether the arbitrator's award draws its essence from the contract of the parties. Courts are not to interfere with an arbitrator's decision unless the contract to be interpreted is not susceptible to the arbitrator's interpretation. The parties have agreed to accept the arbitrator's view of the facts and have authorized him to give meaning to the language of an agreement. Since this court cannot say that the arbitration panel ignored the plain language of the contract, it affirms.

*Chaparral Resources v. Monsanto*, 849 F.2d 1286

Plaintiff, as assignee of Geophysical Systems (GEO), is bringing an action to recover damages for breach of a contract to purchase seismic survey data by Monsanto. After failure by GEO to make timely delivery and disappointment with the quality of the data, Monsanto rescinded the contract. The district court awarded plaintiff damages for the cost of the survey data delivered prior to repudiation, and both parties appealed.

The Tenth Circuit held the district court applied the wrong standard for determining damages. Because Monsanto's rescission of the contract amounted to wrongful repudiation, the proper measure of plaintiff's damages is its expectation rather than its restitution interest. Since Chaparral was compelled to complete its survey, despite Monsanto's breach due to obligations to other parties, it is entitled to damages for data completed after repudiation as well.

*Osgood v. State Farm Mutual Auto Ins. Co.*, 848 F.2d 141

Appellant Osgood appeals a district court order dismissing a claim alleging fraud and requesting punitive damages. The claim arose from a disputed insurance contract, and was dismissed on the grounds it failed to state a cognizable claim under Kansas law. Affirmed.

The court of appeals held that under Kansas law, damages in a breach of contract action are limited to the pecuniary losses sustained; exemplary and punitive damages are not recoverable in the absence of an independent tort causing additional injury. Here, all Osgood's damages flowed from State Farm's breach of contract. There was no independent tort to serve as a basis for punitive damages. The only

possible tort upon which Osgood could have based her claim was the tort of "bad faith," which has yet to be recognized by the Kansas courts.

*Telum Inc. v. E.F. Hutton Credit Corp.*, 859 F.2d 835

Plaintiff-appellee Telum brought suit against defendant-appellant E.F. Hutton to rescind an oil and gas lease and personal guaranties alleging breach of contract and fraud. Following a jury verdict for Telum, the district court rescinded the lease and the personal guaranties and dismissed E.F. Hutton's counterclaims. Reversed.

The lease signed by the parties contained a provision that any litigation arising from the lease would not be tried to a jury. The trial court found that there was a waiver of this provision. The court of appeals disagreed, holding that general allegations of fraud are insufficient to invalidate lease provisions stated in conspicuous print which are agreed to by sophisticated parties. The court of appeals also held that the trial court erred in not admitting evidence offered to prove the existence of a joint venture between the parties.

*Merrill Lynch, Pierce, Fenner, and Smith, Inc. v. Dutton*, 844 F.2d 726

Dutton and Merrill Lynch entered into an employment contract which provided that upon leaving the employ of Merrill Lynch, Dutton would not remove client lists from her files and would not solicit her former Merrill Lynch clients for a period of one year. The contract also provided for Dutton's consent to a temporary restraining order in the event she violated the terms of the agreement. Dutton left Merrill Lynch, and immediately began contacting her former clients. Merrill Lynch sought, and was granted, a temporary restraining order by the district court. Affirmed in part, reversed in part.

The court of appeals held that since Rule 347(b) of the New York Stock Exchange provides for mandatory arbitration between its members and their employees, the temporary restraining order would be valid only until the parties' dispute was considered by an arbitration panel.

*Petromanagement v. Acme-Thomas*, 835 F.2d 1329

Appellant Petromanagement filed two separate actions against appellee Acme-Thomas. The first complaint sought rescission and restitution, and the second complaint sought damages as well as rescission and restitution. Appellant's motions to consolidate the actions were denied. Rather than go to trial on both complaints, Appellant stipulated to dismiss the first complaint with prejudice. Appellee then moved to dismiss the second complaint on grounds of claim preclusion. This motion was granted by the district court. Affirmed.

The court of appeals agreed with the district court's finding that the two actions brought by the appellant arose from a related series of trans-

actions, and that because of this, claim preclusion barred the piecemeal litigation of this dispute.

*APC Operating Partnership v. Mackey*, 841 F.2d 1031

Appellants, as lessors, signed oil and gas leases covering certain parcels of land in Oklahoma. The leases, through various assignments, came to be owned by Appellee APC. The leases had a primary term of five years and provided that delay rentals would be paid to a depository bank. Before the expiration of the primary term, one of APC's predecessors in interest stopped paying the delay rentals to the named depository banks, and started delivering the rental payments directly to the individual lessors at their home addresses via registered mail. Appellants argued that this method of payment did not constitute "tendering to the Lessor" as was required by the leases since the leases did not explicitly authorize tender by mail, and that the leases had therefore expired.

The Tenth Circuit held that the leases had been maintained through the payment of delay rentals directly to the individual lessors by registered mail. The court held that a lessee must in good faith intend to make timely payment of delay rentals, and must take such steps as would accomplish timely payment in due and orderly course but for the intervention of something beyond the lessee's control. Applying this standard, the court held the actions of APC's predecessor in interest did not result in the termination of the oil and gas leases.

*Manchester Pipeline Corp. v. Peoples Natural Gas Co.*, 862 F.2d 1439

Defendant appeals from the jury verdict and award of damages to the plaintiff, and from the award of attorney's fees. The jury verdict is affirmed, but the decision is reversed and remanded for a recalculation of damages.

This action was prompted by the gas purchase contracts entered into between the parties. Specifically at issue was the determination of the custom in the oil and gas industry as to whether the purchasers or sellers draft the contract. In this case, the defendant gas purchaser drew up the contract which the plaintiff alone signed. Consequently, the plaintiff commenced building a pipeline to facilitate the forthcoming gas purchase requested to comply with the contractual obligations. The defendant claimed that a binding contract never existed. Defendant argued on appeal that its motion for judgment n.o.v. should have been granted because of insufficient evidence that the parties had entered into a contract. Under state law, the question of the existence of a contract is a question of fact for the jury. Here, there was sufficient evidence upon which the jury resolved that question. The award of damages was remanded however, on the basis that the district court misinstructed the jury on the computation of damages. The district court should have adhered to the mandate of U.C.C. § 2-723 to calculate market price at the time plaintiff learned of the breach.

